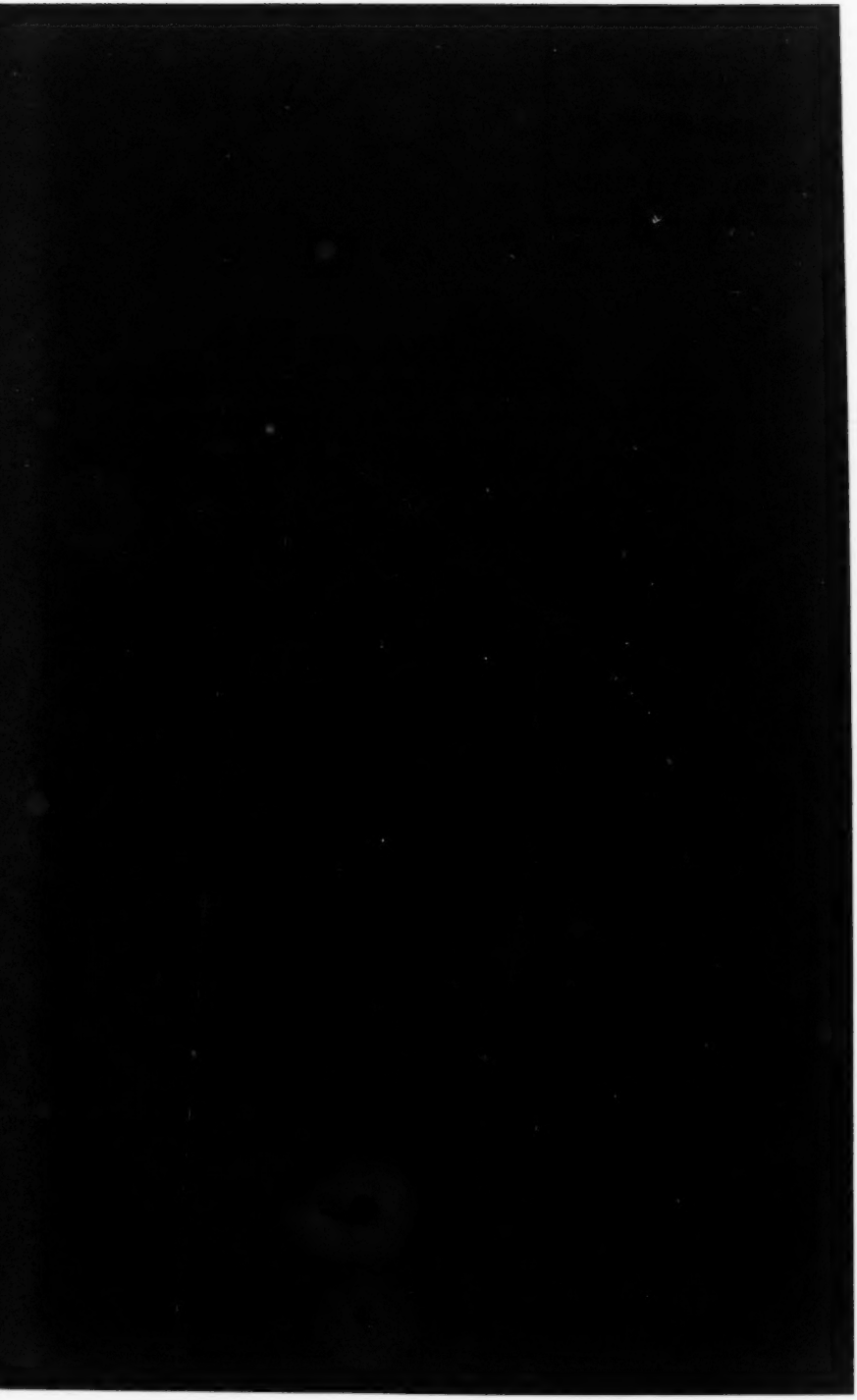

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 800

RUFO C. ROMERO, PETITIONER

v.

P. J. SQUIER, WARDEN, UNITED STATES PENITENTIARY, MCNEIL ISLAND, WASHINGTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 192–203) is not yet reported. A transcript of the oral opinion of the district court appears at R. 31–47 and the court's findings of fact and conclusion of law appear at R. 48–52.

JURISDICTION

The judgment of the circuit court of appeals was entered January 29, 1943 (R. 204). The petition for a writ of certiorari was filed March 8,

1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether there was an illegal search of petitioner's residence and, if so, whether habeas corpus is available to attack a sentence entered after a trial before a court martial during the course of which evidence secured as a result of this search was admitted.

2. Whether, at the preliminary investigation of the charges against him or during his trial, petitioner was illegally denied the assistance of counsel.

3. Whether the finding of the court martial that petitioner was not entrapped into committing the offenses charged against him may be attacked on habeas corpus.

4. Whether petitioner is entitled to be discharged on habeas corpus by reason of the action of the court martial in allowing the withdrawal from the record transmitted to the Judge Advocate General of certain secret maps which had been introduced in evidence at the trial.

ARTICLES OF WAR INVOLVED

Article 17 of the Articles of War (10 U. S. C. 1488) provides in part:

> * * * The accused shall have the right to be represented in his defense before the

court by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by the defense counsel duly appointed for the court pursuant to article 11. Should the accused have counsel of his own selection, the defense counsel and assistant defense counsel, if any, of the court, shall, if the accused so desires, act as his associate counsel.

Article 70 (10 U. S. C. 1542), so far as material, provides:

> No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. * * *

Article 35 (10 U. S. C. 1506) provides:

> The trial judge advocate of each general court-martial shall, with such expedition as circumstances may permit, forward to the appointing authority or to his successor in

> command the original record of the proceedings of such court in the trial of each case. All records of such proceedings shall, after having been acted upon, be transmitted to the Judge Advocate General of the Army.

Article 50½ (10 U. S. C. 1522) provides in part:

> Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President under the provisions of article 46, article 48, or article 51 is submitted to the President, such record shall be examined by the board of review. The board shall submit its opinion, in writing, to the Judge Advocate General, who shall, except as herein otherwise provided, transmit the record and the board's opinion, with his recommendations, directly to the Secretary of War for the action of the President.

STATEMENT

Petitioner, a captain in the Philippine Scouts, 14th Engineers, was convicted by a general court martial at Fort William McKinley, Philippine Islands, on November 25, 1940 (R. 56, 104–107, 177, 178–179, 182), of violating Article 96 of the Articles of War (10 U. S. C. 1568), in that he reproduced and communicated, and conspired to reproduce and communicate, certain secret maps pertaining to the national defense to persons not entitled to receive such information (R. 56, 112–

115). He was sentenced to dismissal from the service, forfeiture of pay and allowances, and fifteen years' imprisonment at hard labor (R. 178). The record of the trial was reviewed by the Staff Judge Advocate (R. 55–104), who recommended that the sentence be approved (R. 103), and it was approved by the Commanding General (R. 179) and confirmed by the President, after review in the Judge Advocate General's Office (R. 180–184). Petitioner was committed to the United States Penitentiary at McNeil Island, Washington (R. 184).

In April 1942, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Washington, alleging that the maps which were the subject of the charges against him and which were introduced in evidence at his trial had been seized in an unlawful search of his premises; that civilian counsel whom he had engaged was excluded from the courtroom at an early stage of his trial; that he had been entrapped into committing the offenses charged against him; and that the maps in question were not included in the trial record which was transmitted to the Judge Advocate General and, therefore, the record was not complete as required by statute (R. 1–8).[1] An order to show cause was issued (R. 8–9) and a hear-

[1] Petitioner had previously sought leave of this Court to file a petition for a writ of habeas corpus and his motion was denied without prejudice to an application in the district court. *Ex parte Romero*, 315 U. S. 782.

ing was held at which petitioner, who was represented by counsel, was present; the matter was then continued for further hearing (R. 10–11). A demurrer to the petition (R. 11) was overruled (R. 27) and the respondent then filed an answer (R. 25–26). At subsequent hearings (R. 12, 26–28, 28–29), the record of the court martial proceedings was introduced in evidence (R. 27).[2] Prior to the final hearing, petitioner, by way of amendment to his petition, filed an "additional point" alleging that he had been denied the assistance of counsel at the preliminary investigation of the charges against him (R. 30). At the conclusion of the hearings the district court, in an oral opinion (R. 31–46) and in formal findings of fact and conclusions of law (R. 48–52), resolved all the controverted issues against petitioner and accordingly denied the petition (R. 29, 52–53). The judgment was affirmed on appeal (R. 204).

The evidence material to the issues raised by petitioner may be summarized as follows:

1. *Search and seizure.*—The maps which were the subject of the charges against petitioner were seized at his home, which was located outside of the military reservation (R. 154), under a search warrant issued by a Philippine justice of the peace

[2] The record contains no testimony by petitioner. However, annexed to the petition for a writ of certiorari as Appendix B (pp. 23–25), are "Excerpts from petitioner's statement made before the district court in Seattle, Washington."

upon the affidavit of agents of the Philippine Constabulary (R. 154–155, 163–165, 185–186). Major J. K. Evans of the United States Army Intelligence (R. 15, 73–74), had made arrangements with Captain Gabriel of the Constabulary (R. 148) for the issuance of the warrant and its execution and the search of petitioner's home was conducted by Major Evans and Captain Gabriel with the assistance of two agents of the Constabulary and a military policeman of the United States Army (R. 148–150, 152–155, 158–160). Major Evans took possession of the maps and photographic negatives which were found in order to prevent them from being seen by other members of the searching party (R. 150, 159–160) and at the conclusion of the search petitioner was arrested (R. 149, 159–160). At petitioner's trial, before the search warrant was produced, it was stipulated that it had been issued and executed by competent authority under the laws of the Philippine Commonwealth (R. 156–157). Although defense counsel did not object to the introduction of the maps in question (R. 135), at the conclusion of the trial petitioner expressed his belief that they should have been excluded as evidence on the ground that Major Evans had "no authority to execute" the search warrant (R. 177).

2. *Assistance of counsel.*—(a) In his "additional point" filed in the district court (see p. 6, *supra*), petitioner asserted that one Mr. Lynch, an attorney

whom he had consulted prior to the investigation of the charges against him, was not permitted to be present at the investigation (R. 30). Nothing more appears in the record on this point except the district judge's statements in his oral opinion that during the investigation petitioner was given the names of the prosecution's expected witnesses, that the witnesses were examined in petitioner's presence and he was allowed to cross-examine them, and that some written evidence was shown to petitioner (R. 37).[3]

(b) Military defense and assistant defense counsel were appointed for the trial of petitioner in accordance with Article 11 of the Articles of War (10 U. S. C. 1482) (R. 105–106, 109). At the opening of the trial petitioner introduced civilian counsel Benjamin C. De Guzman. Petitioner was then asked whether he desired to have the appointed military defense and assistant defense counsel act as associates with De Guzman (see Article of War 17, *supra,* pp. 2–3), and he replied that he wished the appointed officers to conduct

[3] According to the excerpts from petitioner's "statement" before the district court which are annexed as Appendix B to the petition for a writ of certiorari, petitioner also requested prior to trial that a Major Poblete act as his counsel, but this request was denied by the Commanding General (Pet. 24). While petitioner's statement asserts that no reason was given for the denial of his request (Pet. 24), it should be noted that Article 17 of the Articles of War (*supra*, pp. 2–3) provides that the accused may have military counsel of his own choosing "if such counsel be reasonably available."

the defense with De Guzman acting as associate counsel. His request was approved. (R. 109–110.) Prior to the introduction in evidence of the secret maps, all non-military personnel, including De Guzman, were excluded from the courtroom (R. 128–130). Petitioner and military defense counsel were present, however, during this stage of the proceedings and defense counsel cross-examined the prosecution witness with respect to the maps (R. 136–142, 142–143). No objection to the exclusion of De Guzman was made by petitioner, De Guzman, or military defense counsel (R. 96, 129, 144), and De Guzman returned to the courtroom after the maps had been introduced (R. 144).

Later during the trial the military assistant defense counsel was excused at petitioner's request and petitioner declined to have any other officer appointed to assist in his defense (R. 146–147). Still later De Guzman, without objection by petitioner or his military counsel, withdrew from the case (R. 15, 97–98, 147).[4] De Guzman subsequently appeared as attorney for two defense witnesses (R. 167–168, 169–170).

3. *Entrapment.*—The evidence for the prosecution showed that one Agbay proposed to Anis Y. Gepte, a secret operative of the Philippine Army

[4] De Guzman's letter of withdrawal, as published in the Philippines Herald, is annexed to the petition for a writ of certiorari as Appendix A (pp. 22–23), but is not part of the record.

(R. 15, 19, 72, 147–148) called as a witness for the prosecution (R. 15, 144), that they could make some money by selling a certain map to the Japanese. Gepte told Agbay that the Sultan of Mindanao, a fictitious person, was a prospect to whom they might sell maps. Agbay later introduced Gepte to one Cabrera. The latter gave Gepte a map of Lingayen Gulf to show to the Sultan and told Gepte that he could furnish any map of the Philippine Islands. Gepte took the map to an officer of the Philippine Army, who, in turn, took Gepte to Major Evans of the United States Army Intelligence. Gepte was detailed to work with Major Evans and the Major instructed him to ask Cabrera for certain maps. Gepte did so and, after further negotiations between Gepte, Agbay, and Cabrera, the latter introduced Gepte to petitioner. Thereafter petitioner took the maps from Fort William McKinley to his home, where he photographed them (R. 15–18, 72–78, 144–145, 150–151).

Agbay and Cabrero, called as witnesses for the defense, testified to the effect that Gepte laid plans to "frame-up" petitioner and enlisted their aid by promises of reward (R. 84–89, 166–167, 169, 170–172), but this was denied by Gepte (R. 84).

4. *Incompleteness of the trial record.*—At the time the maps in question were introduced in evidence the trial judge advocate requested authority

to withdraw them from the record at the conclusion of the trial because of their secret nature (R. 135). Defense counsel stated that there was no objection to their withdrawal and the law member of the court accordingly ruled that they might be withdrawn at the close of the trial (R. 144). Consequently, the record transmitted to the Judge Advocate General for review did not contain the maps.

ARGUMENT

1. The record furnishes no support for petitioner's contention (Pet. 6–10) that the search of his home and seizure of the maps which were the subject of the charges against him were illegal because the search and seizure were made by Major Evans, a federal officer, under color of a search warrant issued under the laws of the Philippine Commonwealth. The evidence (*supra,* pp. 6–7) shows that Major Evans participated with Captain Gabriel of the Philippine Constabulary in making the search for the stolen maps. Such participation by a federal officer does not render the search a federal undertaking. *Byars* v. *United States,* 273 U. S. 28, 32. Moreover, the *Byars* and other cases upon which petitioner relies (Pet. 9–10) do not hold that evidence seized under a state search warrant executed jointly by state and federal officers may not be used as the basis for a federal prosecution; they hold only

that evidence seized under a state warrant so executed may not be used by the federal government if the warrant does not satisfy the requirements of the Fourth Amendment and the laws of the United States. Cf. *Myers* v. *United States,* 49 F. (2d) 230, 231 (C. C. A. 4), certiorari denied, 283 U. S. 866. In the instant case there is nothing to indicate, and petitioner does not claim, that the application for the warrant did not meet the federal requirements. It was stipulated at petitioner's trial that the warrant was properly issued by competent authority under the laws of the Philippine Commonwealth (R. 156). Necessarily, therefore, it satisfied the federal test, for the validity of a Philippine search warrant is governed by the principles enunciated in the interpretation and application of the Fourth Amendment. *People* v. *Rubio,* 57 Phil. 384, 387–388 (1932).

But even conceding, *arguendo,* that the maps in question were secured by means of an illegal search and were for that reason improperly admitted at petitioner's trial, the question of their admissibility was one which the court martial had jurisdiction to determine, subject, of course, to review by higher military authority. Hence, it would not seem that any error in the admission of the maps would have affected the jurisdiction of the court martial and thus afford any basis for the discharge of petitioner on habeas corpus. Cf.

Price v. *Johnston*, 125 F. (2d) 806 (C. C. A. 9), certiorari denied, 316 U. S. 677, where release on habeas corpus was denied although the conviction was assumed to rest upon evidence secured in violation of the Fourth Amendment and admitted over appropriate objection.[5]

2. (a) In contradistinction to Article 17 of the Articles of War, which expressly confers the right to be represented by counsel at a trial by court martial (*supra*, pp. 2–3), Article 70 of the Articles of War, while requiring a preliminary investigation before a charge is referred to a general court martial for trial and affording the accused a hearing at the investigation, makes no provision that the accused may be represented by counsel at such hearing (*supra*, p. 3). Hence, there is no basis for petitioner's contention (Pet. 10–12) that he is entitled to be discharged because he was denied the assistance of counsel at the investigation of the charges against him. Moreover, the inquiry required by Article 70 precedes the forwarding of the charges for trial and is analogous to a grand jury investigation.[6] Denial of an opportunity to con-

[5] See also *Matter of Moran*, 203 U. S. 96, 105, and our memoranda in opposition in *Kelly* v. *Johnston*, No. 398, this Term, certiorari denied, January 11, 1943, and *Graham* v. *Squier*, No. 685, this Term, certiorari denied, March 15, 1943.

[6] Cf. *United States* v. *Smith*, 197 U. S. 386, 391–392, holding that the requirement of Article 43 of the Navy Articles (34 U. S. C. 1200) that the accused be furnished with copies of the charges at the time of his arrest does not refer to arrest for the purpose of investigation.

sult with counsel prior to giving testimony at a grand jury investigation affords no basis for a claim of lack of jurisdiction in the convicting court. *Gilmore* v. *United States,* 129 F. (2d) 199, 203 (C. C. A. 10), certiorari denied, October 12, 1942, No. 272, this Term.

(b) The right to be represented by counsel at a trial by court martial is conferred by the Articles of War, not by the Sixth Amendment to the Constitution. The exception from the operation of the Fifth Amendment of "cases arising in the land or naval forces" is, by implication, extended to the Sixth. *Ex parte Quirin,* July Special Term, 1942. Article of War 17 (*supra,* pp. 2–3) makes no provision for associate civil counsel; it contemplates civil counsel as principal counsel only. When, therefore, the court martial acceded to petitioner's request that De Guzman, petitioner's civil counsel, be allowed to act as associate counsel with the appointed military defense and assistant defense counsel, the court accorded petitioner a privilege to which he was not entitled. Hence, there is no basis for petitioner's contention (Pet. 13–16) that the action of the court in excluding De Guzman when secret documents were introduced, had the effect of depriving the court of jurisdiction to proceed. Furthermore, there was no objection to De Guzman's exclusion and, in addition, the appointed military defense counsel whom petitioner had expressly designated as his

principal counsel, was present at all stages of the trial.[7]

3. The evidence before the court martial on the issue of entrapment was conflicting (see pp. 9–10, *supra*). At a trial before a civil court it would have presented an issue of fact for the judge or jury. *Sorrells* v. *United States,* 287 U. S. 435, 452; *Weathers* v. *United States,* 126 F. (2d) 118, 119 (C. C. A. 5), certiorari denied, 316 U. S. 681. The equivalent of an appellate court, the Staff Judge Advocate,[8] upheld the court's finding against petitioner on this issue (R. 100–102), and the sentence imposed upon petitioner was approved by the Commanding General (R. 179) and confirmed by the President upon the recommendation of the Judge Advocate General (R. 180–184). Contrary to petitioner's contention (Pet. 16–19), this determination by the court martial of an issue within the scope of its jurisdiction is not re-

[7] Petitioner also asserts that he was without the benefit of counsel from the day of his arrest to the day of his trial (Pet. 11). However, there is nothing in the record, or even in the material appended to the petition for a writ of certiorari (Pet. 22–25), which supports this assertion. On the other hand, the record affirmatively shows that military defense and assistant defense counsel, along with the other personnel of the court martial, were appointed a week before the trial commenced (R. 104, 105–106, 108, 109). In addition, there is nothing to indicate that petitioner did not have full opportunity to consult with De Guzman, his civil counsel, prior to trial.

[8] See Article 46 of the Articles of War (10 U. S. C. 1517).

viewable in a civil court. *Mullan* v. *United States,* 212 U. S. 516, 520; *Ex parte Reed,* 100 U. S. 13, 23; *In re Grimley,* 137 U. S. 147, 150; *Carter* v. *Woodring,* 92 F. (2d) 544, 546 (App. D. C.), certiorari denied, 302 U. S. 752; *Mosher* v. *Hudspeth,* 123 F. (2d) 401, 402 (C. C. A. 10), certiorari denied, 316 U. S. 670.

4. Finally, there is no merit in petitioner's contention (Pet. 19–21) that his conviction is void because the secret maps introduced in evidence at his trial were not included in the record transmitted to the Judge Advocate General. The record shows that defense counsel examined the maps before they were offered and expressly stated that there was no objection to their withdrawal at the close of the trial (R. 135, 144). Furthermore, as the court below stated (R. 203), the trial record contained a sufficient description of the maps (see R. 131–135) and this would seem to constitute compliance with the requirements of Articles 35 and 50½ of the Articles of War (*supra,* pp. 3–4) that the record of the proceedings of the court martial be transmitted.[9]

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[9] Cf. *A Manual for Courts-Martial* (1928 ed.), which, in setting out a form for transmission of the record, states (Appendix 6, p. 269):

"Bulky exhibits such as a pistol will not ordinarily be attached to the record. Where advisable or necessary, a description or photograph of such an exhibit may be attached as an exhibit, an appropriate statement being made in the record."

In any event, even if it was error to withdraw the maps, the error was one in procedure only; such errors do not go to the jurisdiction of the court martial and are not reviewable on habeas corpus. *Johnson* v. *Sayre,* 158 U. S. 109, 118; *Ex parte Tucker,* 212 Fed. 569, 570 (D. Mass.); cf. *Keyes* v. *United States,* 109 U. S. 336, 340; *Swaim* v. *United States,* 165 U. S. 553, 561.

CONCLUSION

The decision below is correct, and there is involved no conflict of decisions or question of general importance. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
Attorneys.

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